Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

After marriage breakdown

Information on the on-reserve matrimonial home

Canada

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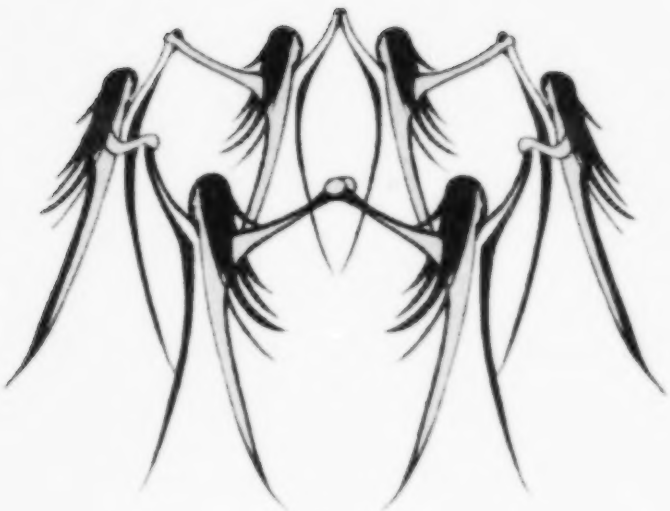

Women's Issues and Gender Equality Directorate
Indian and Northern Affairs Canada (INAC)

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This document provides information on the on-reserve matrimonial home after the breakdown of a marriage or a common-law relationship. It contains information on the laws as they were at the time this document was written. Laws can change. This document does not contain legal advice or replace the specialized advice of lawyers or other experts.

Introduction

At present, people living on a reserve have fewer rights regarding their matrimonial home when a marriage or common-law relationship ends than do people living off a reserve. Put simply, most of the legal rights and remedies found in Canadian laws relating to the matrimonial home, which apply off-reserve, are not available to people living on a reserve.

Groups, such as the Native Women's Association of Canada, the Royal Commission on Aboriginal Peoples, the British Columbia Native Women's Society, the National Association of Women and the Law, and the National Action Committee on the Status of Women, have expressed concerns about the status of the law.

- People living off a reserve have more rights and protections with respect to matrimonial property than people living on a reserve during a marriage and when a marriage ends.
- The Royal Commission on Aboriginal Peoples found a bias in favour of men receiving certificates of possession for the matrimonial home. The Commission noted that women are entitled to hold a Certificate of Possession, but there is a perception that they cannot. A court cannot change who holds a Certificate of Possession. This may mean that the wife and children have to leave the reserve when the marriage or common-law relationship ends. Even when a Certificate of Possession is jointly held by both spouses, there are no enforceable rules about who gets to stay in the matrimonial home.
- The Royal Commission on Aboriginal Peoples reported on housing shortages on reserves and the consequences for women and children who are victims of family violence. Individuals experiencing family violence have a right to the protection of the law so they can stay in the matrimonial home, without the abusive family member continuing to live there too. However, if the Certificate of Possession for the on-reserve matrimonial home is held in the name of the abusive spouse, there is no legal remedy the abused spouse can use to obtain possession of the matrimonial home for her or himself, and any children in her/his custody.

- Protections found in provincial and territorial family law, and in federal criminal law concerning the matrimonial home are not fully available to women and their children who are living on a reserve when a marriage or relationship ends.

This document provides information about the on-reserve matrimonial home when a marriage or common-law relationship breaks down. While it does not suggest options or solutions, it does provide background legal information so people can talk together and find ways to address these concerns, which tend to affect women and children more.

What is the matrimonial home?

The matrimonial home is the family home. It is where the family lives and where the children feel most comfortable. Often, it is the most expensive and valuable thing the family owns.

The matrimonial home is a type of "real property." The Canadian legal system distinguishes between "real property" and "personal property." In Quebec, the law refers to "movable" and "immovable" property.

Examples of real (immovable) property include land and the buildings on it, such as the matrimonial home.

Personal (movable) property includes clothes, jewelry, furniture, tools, a car and money in a bank account.

A simple way of thinking about the difference between personal and real property is that you can take personal property with you, but real property cannot be moved.

How do First Nations manage matrimonial real property on reserve lands?

First Nations communities manage their reserve lands under:

- the *Indian Act*;
- the *First Nations Land Management Act*, or
- a self-government agreement.

Indian Act

The *Indian Act* applies to reserves that have been created under the *Indian Act*. It says nothing about matrimonial real property and what should happen to the housing being used by a couple when the relationship ends.

First Nations Land Management Act

The *First Nations Land Management Act* came into force in 1999. Under this law, every two years, a limited number of First Nations communities have the opportunity to take responsibility for the management of their reserve land. In doing so, each First Nation must write a land code, including rules and procedures on matrimonial real property, in consultation with its members.

Self-government agreements

A First Nation may negotiate a self-government agreement with the Government of Canada or with the Government of Canada and the government of the province or territory where the First Nation lives. A self-government agreement may concern one subject or cover a wide range of subjects, for example, marriage, land use and property rights. First Nations with self-government agreements which include provisions on the allotment and disposition of land would likely be able to pass laws dealing with matrimonial real property, if they wanted to do so.

How is reserve land allotted to band members?

Under the *Indian Act*, a band does not own reserve land but has a right to use it. The band cannot sell land to band members but may give them a right to occupy or live on the land or in a house on the land.

Bands have different systems for assigning land and housing on reserves. It may be:

- land for which a person has a Certificate of Possession; or
- land that is used by a person or family members through tradition or custom.

A Certificate of Possession

Band councils may allot a part of reserve land to an individual band member for personal use. The Minister of Indian Affairs and Northern Development must approve the band council's decision. Once approved, the member receives a Certificate of Possession. It entitles the person to use the land and the housing on it or to build housing on the land. The person who has a Certificate of Possession may transfer it to another member of the band or to the band with the approval of the Minister. Certificates of possession are recorded in Indian and Northern Affairs Canada's Reserve Land Register.

Some bands make an allotment jointly to a husband and wife who are both named on the Certificate of Possession. Generally, however, joint certificates of possession are not commonly issued.

Custom allotment system

Some bands do not use certificates of possession, relying instead on allotments based on custom following traditional band practices. A band's custom allotment decisions are not presented to the Minister for approval, cannot be registered in the Reserve Land Register and are not officially recognized under the *Indian Act*.

Off a reserve, who has a right to possession of the matrimonial home?

Legally married couples

The law provides that both spouses have an equal right to stay in the matrimonial home unless a judge decides one spouse must move out. It does not matter if one person owned the home before the couple got together, if the house was bought using only one person's money, if a pre-marriage agreement says the house belongs to one of the spouses, or if only one of their names appears on the legal documents for the house. In all cases, both a husband and a wife have an equal right to the possession of the matrimonial home.

If spouses separate, they will have to decide who will continue to live in the matrimonial home. If they cannot agree, they can go to court and a judge decides for them.

- Because both spouses have a right to stay in the matrimonial home, neither spouse can sublet it, rent it, sell it or mortgage it without the other spouse's permission. If one spouse does any of the above without the other spouse's consent, a court can declare the action invalid.
- The court can give one spouse the right to live in the matrimonial home and make the other spouse leave for a specific amount of time. Usually, the court allows the spouse who is taking care of the children to stay in the matrimonial home.
- The court can decide on the value of the home and allow one spouse to buy the other spouse's interest in the house.
- The court can order the sale of the house and give directions on how the money made from the sale will be divided between the husband and wife.

Common-law couples

If you live with someone without being married, people say you are in a "common-law relationship" or "cohabiting." The laws concerning who gets to stay in the matrimonial home at the end of a common-law relationship vary among the provinces and territories. Some provinces and territories treat married couples and common-law couples the same; others provide less protection.

Same-sex couples

The law is in a state of change concerning the rights of same-sex couples. There is growing legal recognition of same-sex relationships, and same-sex couples are now beginning to win the right to the same benefits given to common-law couples.

Aboriginal customary marriage

An Aboriginal community may have customs by which a couple may be married. A court would assess the circumstances of each couple claiming to have an Aboriginal customary marriage if the marriage broke down and the couple were unable to come to an agreement about the division of their property. The court would determine if the relationship would be recognized as a legal marriage. How provincial and territorial matrimonial real property laws apply to an Aboriginal customary marriage is not certain at this time.

On a reserve, who has a right to possession of the matrimonial home?

The *Indian Act* says nothing about matrimonial real property for any type of relationship.

Provincial and territorial courts do not have the authority to deal with matrimonial real property on a reserve. They cannot order the spouse with a Certificate of Possession to leave the matrimonial home on a reserve so the other spouse can live there. They cannot order the property to be seized and sold.

A court also cannot make a decision about the possession or division of the matrimonial home. This means that when a relationship breakdown occurs, if the spouse with custody of the children is not named on the Certificate of Possession, he or she may have to leave the reserve with the children.

Housing shortages on reserve land add to the problem. For a non-member living on a reserve with a band member, the end of the relationship usually means the end of the opportunity to live on the reserve.

Even when the man and woman are named jointly on the Certificate of Possession, if there is a disagreement over who should stay in the home, a judge has no authority to decide which spouse can stay in the home with the children. The situation cannot be resolved in the courts.

The court can, however, order one spouse to pay money to the other spouse to compensate for the spouse's share of the value of the matrimonial home. However, these court orders are hard to enforce due to restrictions on the seizure of property and garnishment on reserves.

In summary, the lack of laws related to on-reserve matrimonial real property results in people, mostly women, living on a reserve, who do not have a Certificate of Possession, and do not have the same legal rights or access to the same legal remedies as people who live off a reserve. These individuals may have to leave their matrimonial home and, in some cases, leave the reserve.

What happens if there is family violence?

Family violence occurs everywhere, including on reserves. Anyone in a family may be affected by family violence. Victims of violence may seek protection from the police and the court system. There are laws available to people living on a reserve who want protection from abusive partners. Although it is possible to obtain a restraining order under the *Criminal Code*, the courts cannot order an abusive spouse to leave the matrimonial home if the Certificate of Possession is in the abusive spouse's name.

Other sources of information

Discussion Paper: Matrimonial Real Property Issues On Reserve. Wendy Cornet and Allison Lendor, published by the Women's Issues and Gender Equality Directorate, Indian and Northern Affairs Canada. For a copy, contact Women's Issues and Gender Equality Directorate, Room 5B, 10 Wellington Street, Gatineau, QC K1A 0H4.

Aboriginal Law Handbook. Check your local library or friendship centre or call toll-free: 1 (800) 387-5164.

For the location of the family court in your community look in the blue pages of your telephone directory under "Courts" in the Index-Government Listings.

For information on divorce and child support visit the Department of Justice Canada Web site at www.canada.justice.gc.ca/en/ps/pad/ and www.canada.justice.gc.ca/childsupport or contact:

Family, Children and Youth Section
Department of Justice Canada
284 Wellington Street, Ottawa, Ontario K1A 0H8
Toll free information line: 1 (888) 373-2222
Telephone: (613) 946-2222 Fax: (613) 952-2211
E-mail: cstepae@justice.gc.ca

Legal aid offices may be able to help you. For more information, contact the legal aid office in your community. For the telephone number, refer to the white pages of your telephone directory under "Legal Aid."

Terminology

Band by-laws A band council may pass by-laws under the authority of the *Indian Act*, which deal with a variety of subject matters such as public health, local works and the residence of band members and other persons living on a reserve.

Canadian Charter of Rights and Freedoms The Charter came into force in 1982 and is the part of Canada's constitution that guarantees certain rights and freedoms. Section 15 of the Charter guarantees that every individual is equal under the law and has a right to the equal protection and equal benefit of the law without discrimination. The Charter prohibits discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Certificate of Possession The holder of a Certificate of Possession is entitled to possess a specific allotment of land, which may or may not have a house on it. Certificates of possession are issued by the Minister of Indian Affairs and Northern Development after the Minister has approved an allotment of land, by the band council, to a member of a band. Certificates of possession replace location tickets which were issued on or before September 4, 1951.

Common-law couple A male and female who have lived together as husband and wife for a specific period of time, which is generally required to be a minimum of one year, have a legal status as a "common-law couple." Depending on the laws of the province or territory, a common-law couple may be treated, for certain purposes, as if they were legally married.

Custom allotment An allotment, by a band council, of reserve lands to band members, based on a traditional or customary practice of the band, is known as a "custom allotment." The Minister of Indian Affairs and Northern Development does not approve a custom allotment as this type of land allotment is not recognized under the *Indian Act* and is, therefore, not registered in the Reserve Land Register.

First Nations Land Management Act This federal law came into force in 1999. It gives participating First Nations the opportunity to manage the use and occupancy of reserve land and requires them to develop a land code after community consultations. The land code must include rules and procedures on matrimonial real property, that is, the use, occupation and possession of reserve land, and the division of interests in reserve land in cases of marriage breakdown.

Indian Act Canadian federal legislation, first passed in 1876, and amended several times since, it sets out certain federal government obligations and regulates the management of Indian reserve lands, Indian moneys and other resources. Among its many provisions, the *Indian Act* currently requires the Minister of Indian Affairs and Northern Development to manage certain moneys belonging to First Nations and Indian lands and to approve or disallow First Nations by-laws. In 2001, the national initiative *Communities First: First Nations Governance* was launched, to consult with First Nations peoples on the issues of governance under the *Indian Act*. The process will likely take two to three years before any new law is implemented.

Legal marriage Legal marriage is the term applied to the recognition by the federal and/or provincial/territorial governments of the legal relationship between a man and a woman who have participated in a civil or religious ceremony for which a marriage certificate has been issued by the province or territory where the ceremony took place.

Matrimonial home The home in which a couple lives as husband and wife is called the "matrimonial home." When a couple is legally married, they share equal rights to possession of the matrimonial home.

Matrimonial real property See Real (immovable) property.

Personal (movable) property Personal property includes things that can be moved from one place to another, such as a car, money, clothes or personal possessions. It is not land or any building on the land.

Real (immovable) property Land and things attached to the land such as a house or other buildings are considered "real property." The difference between real and personal property is that real property cannot be moved. Matrimonial real property is real property that is shared by a couple in a relationship or a family. It includes the matrimonial home.

Reserve land Land set aside by the federal government for the use and benefit of an Indian band is called "reserve land."

Reserve Land Register The Register is kept by Indian and Northern Affairs Canada and contains particulars related to certificates of possession, certificates of occupation and other transactions concerning land on a reserve.

Self-government agreement This type of agreement between an Aboriginal group and the federal and possibly, provincial/territorial governments describes the law-making authority of the Aboriginal group with respect to the subject matters contained in the self-government agreement. For example, a self-government agreement could address land use and property rights.